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PUBLIC MATTER

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THE STATE BAR COURT

HEARING DEPARTMENT - LOS ANGELES

In the Matter of)
DONALD L. BIERMAN,)
Member No. 157130,)
A Member of the State Bar.)

Case No. 02-O-10549; 02-O-11919;
02-O-11854; 02-O-11408-JMR

DECISION

INTRODUCTION

In this disciplinary matter, Maria J. Oropeza appeared for the Office of the Chief Trial Counsel of the State Bar of California (State Bar). Respondent Donald L. Bierman (Respondent) did not appear in person or by counsel.

After considering the evidence and the law, the court recommends that respondent be suspended for two years and until he makes specified restitution, and that the suspension be stayed on conditions including 60 days actual suspension and until he provides proof no restitution is owed or makes specified restitution and complies with rule 205 of the Rules of Procedure of the State Bar of California (Rules of Procedure).

SIGNIFICANT PROCEDURAL HISTORY

The Notice of Disciplinary Charges (NDC) was filed on June 24, 2003, and was properly served on Respondent on that same date at his official membership records address, by certified mail, return receipt requested, as provided in Business and Professions Code section 6002.1(c) ("official address"). Service was deemed complete as of the time of mailing. (*Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1186.) The NDC was not returned by the United States Postal Service as undeliverable.

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1 On June 26, 2003, Respondent was properly served at his official address with a notice
2 advising him, among other things, that an initial status conference would be held on July 28,
3 2003.

4 Respondent did not file a responsive pleading to the NDC. On July 22, 2003, a motion
5 for entry of default was filed and properly served on respondent at his official address by certified
6 mail, return receipt requested. The motion advised him that minimum discipline of 90 days
7 actual suspension would be sought if he was found culpable. He did not respond to the motion.

8 Respondent did not appear at the July 28, 2003, status conference, following which an
9 order was properly served on him, advising him that the motion for entry of default, filed by the
10 State Bar on July 22, 2003, was pending before the court.

11 On August 7, 2003, the court entered Respondent's default and enrolled him inactive
12 effective three days after service of the order. The order was properly served on him at his
13 official address on that same date by certified mail, return receipt requested. However, the
14 mailing was returned by the United States Postal Service as unclaimed. The order indicated that
15 no default hearing would be held unless requested by the State Bar, and that any further exhibits,
16 declarations, and legal argument had to be submitted no later than August 27, 2003.

17 On August 27, 2003, the State Bar filed a request for waiver of default hearing and a brief
18 on culpability and discipline. The matter was submitted for decision on August 27, 2003.

19 **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

20 The court's findings are based on the allegations contained in the NDC as they are
21 deemed admitted and no further proof is required to establish the truth of those allegations. (Bus.
22 & Prof. Code, § 6088; Rules Proc. of State Bar, rule 200(d)(1)(A).)

23 **Jurisdiction**

24 Respondent was admitted to the practice of law in California on December 17, 1991, and
25 has been a member of the State Bar at all times since.

26 **General Background Facts**

27 Between 1999 and 2001, Respondent provided legal services through a group legal
28 services plan. Respondent's name would be given to members of the plan who were in need of

1 legal assistance. With the exception of Eunice Riedstra (Counts One and Two) the other three
2 clients (Counts Three through Nine) were referred to Respondent by their employer as part of a
3 group legal services plan.

4 After accepting these referrals, Respondent did not complete the legal matters, but
5 instead, ceased performing legal services with no notice to the clients. In addition, Respondent
6 ceased communicating with the clients and did not respond to the clients' letters, e-mails or
7 telephone messages. In frustration, because they were unable to get in touch with Respondent to
8 find out the status of their legal matters, two of the clients complained to their group legal
9 services provider.

10 **Case No. 02-O-10549 - The Riedstra Matter - Counts One and Two**

11 **Facts**

12 On June 15, 1995, Eunice Riedstra (Riedstra) retained Respondent to assist her in the
13 probate of her mother's estate. Respondent also agreed to draft and complete a living trust and to
14 transfer title on real estate which Riedstra inherited from her father and mother, the Collinsville
15 property and the San Francisco property, respectively.

16 On November 26, 1996, the final distribution of the estate was completed. In addition, at
17 some point, the exact date of which is unknown, Respondent also completed a living trust for
18 Riedstra.

19 In October 2000, Respondent began working on the title transfer for the Collinsville
20 property. However, Respondent did not complete the title transfer, despite his promises to send
21 forms Riedstra to complete the work.

22 In January 2001, and on April 2 and 25, 2001, Respondent promised Riedstra that he
23 would look into the status of the title transfer for the San Francisco property. Thereafter,
24 Respondent failed to report back to Riedstra any information about the title transfer.

25 From April 25, 2001 through August 2001, Riedstra called Respondent's office, leaving
26 messages asking for status updates regarding the title transfers. Respondent did not return any of
27 Riedstra's telephone calls.

28 On September 24, 2001, Riedstra sent a certified letter to Respondent requesting

1 completion of the title transfers and delineating her efforts to communicate with him regarding
2 the title transfers.

3 In October 2001, Riedstra executed a quit claim deed in order to sell the Collinsville
4 property, because as of that time, Respondent had not completed the title transfer.

5 Respondent did not finalize the transfer of the San Francisco property until December
6 2001, which was at least eleven months after he promised Riedstra that he would look into the
7 status of the transfer.

8 On April 27, 2003, Riedstra was informed by the San Francisco Assessor's office that she
9 owed \$240 for exemption for 1999-2001.

10 **Legal Conclusions**

11 **Count One - Rule 3-110(A) (Failing to Perform Competently)**

12 Rule 3-110(A) of the Rules of Professional Conduct¹ prohibits an attorney from
13 intentionally, recklessly or repeatedly failing to perform legal services competently.

14 By failing to timely execute the title transfer for the San Francisco property and never
15 executing the title transfer for the Collinsville property, Respondent intentionally, recklessly or
16 repeatedly did not perform competently the legal services for which he was employed, in wilful
17 violation of rule 3-110(A).

18 **Count Two - Section 6068(m) (Failure to Communicate)**

19 Section 6068(m) of the Business and Professions Code² requires an attorney to respond
20 promptly to reasonable status inquiries of clients and to keep clients reasonably informed of
21 significant developments in matters with regard to which the attorney has agreed to provide legal
22 services.

23 By not responding to the telephone calls of Riedstra, asking for status updates regarding
24 the title transfers, Respondent did not respond to his client's reasonable status inquiries, in

25 _____
26 ¹Unless otherwise noted, all further references to "rule(s)" refer to the Rules of
Professional Conduct.

27 ²Unless otherwise noted, all further references to "section" refer to the Business and
28 Professions Code.

1 violation of section 6068(m).

2 **Case No. 02-O-11408 - The Rodgers Matter - Count Three**

3 **Facts**

4 On June 4, 2001, Sheryl Rodgers (Rodgers) employed Respondent to represent her in a
5 marital dissolution matter. Rodgers had obtained Respondent's name from her employer as part
6 of its group legal service plan. No fee agreement was executed between Rodgers and
7 Respondent. However, on June 4, 2001, Respondent requested and received advanced attorney
8 fees in the amount of \$400.

9 On June 8, 2001, Respondent filed a response in the marital dissolution action.

10 On June 11, 2001, Rodgers faxed to Respondent a list of joint bills and an agreed upon
11 monthly payment schedule between her and her soon to be ex-husband. She followed up the fax
12 by calling Respondent on that same date and leaving a message that she had sent the information
13 by fax.

14 In mid-July 2001, Rodgers called Respondent and requested a status update in the
15 dissolution matter. When Respondent returned Rodgers' call, he promised to send her a draft
16 marital settlement agreement. However, Rodgers never received a draft marital settlement
17 agreement from Respondent.

18 Thereafter, Respondent ceased performing any work in the marital dissolution matter.
19 However, Respondent did not inform Rodgers that he had ceased performing legal services on
20 her behalf.

21 On September 6, 2001, Rodgers sent Respondent an e-mail requesting a status update in
22 her marital dissolution matter. In addition, Rodgers noted that Respondent still had not deposited
23 her check of \$400 paid as advance fees. Respondent did not respond to the e-mail sent by
24 Rodgers,

25 In October 2001, Rodgers placed several telephone calls to Respondent. While Rodgers
26 did not leave a message every time she called Respondent, on occasion she did leave a message
27 asking specific questions and requesting that he give her an update on her case. Respondent did
28 not respond to any of the messages left by Rodgers seeking status information.

1 On October 12, 2001, Respondent deposited Rodgers' check for \$400 for advance fees,
2 which had been given to him on June 4, 2001.

3 In November 2001, Rodgers contacted her group legal service plan provider and made a
4 complaint regarding Respondent's lack of communication regarding her legal matter.

5 In late November 2001, Respondent left a message for Rodgers on her home telephone.

6 On February 15, 2002, Rodgers sent Respondent a letter, via certified mail, requesting
7 that Respondent send her an itemized bill for his legal services. Respondent signed for the
8 certified letter on February 24, 2002.

9 On March 15, 2002, Rodgers retained new counsel to represent her in the marital
10 dissolution matter, and a substitution of attorney was filed in the case.

11 On June 5, 2002, Respondent sent Rodgers an itemized bill, which Rodgers maintains
12 contains several errors, specifically, the amount of time charged for drafting the marital
13 settlement agreement, given that Rodgers never received the settlement agreement from
14 Respondent.

15 **Legal Conclusions**

16 **Count Three - Rule 3-700(A)(2) (Improper Withdrawal from Representation)**

17 Rule 3-700(A)(2) prohibits an attorney from withdrawing from employment until he or
18 she has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of a client,
19 including giving due notice to the client, allowing time for employment of other counsel,
20 complying with rule 3-700(D) and with other applicable laws and rules.

21 After filing a response in the marital dissolution action, Respondent ceased performing
22 services for Rodgers. By ceasing to perform any services for Rodgers, but without giving her
23 notice that he was ceasing to act on her behalf, and without allowing her time to employ other
24 counsel, Respondent effectively withdrew from employment without taking reasonable steps to
25 avoid reasonably foreseeable prejudice to his client in wilful violation of rule 3-700(A)(2).

26 **Case No. 02-O-11854 - The Gueye Matter - Count Four through Six**

27 **Facts**

28 On October 22, 2001, Ndap Gueye (Gueye) paid Respondent \$200 as advanced attorney

1 fees. Gueye obtained Respondent's name from her employer as part of its group legal service
2 plan. In November, 2001, Gueye hired Respondent to file a bankruptcy petition. No fee
3 agreement was executed between Gueye and Respondent.

4 Gueye paid Respondent an additional \$600 in advanced attorney fees, paying him \$200
5 on December 5, 2001, and \$400 on January 17, 2002.

6 Respondent ceased performing any work on Gueye's bankruptcy, but did not inform
7 Gueye of his intention to cease representation in the matter.

8 From February 2002 through June 2002, Gueye placed phone calls to Respondent,
9 requesting status updates in the bankruptcy matter. Respondent did not respond to any of the
10 telephone inquiries.

11 On March 22, 2002, Gueye faxed to Respondent a letter from one of her creditors. On
12 March 23, 2002, Gueye sent Respondent an e-mail explaining her attempts to reach him and
13 advising him that she was receiving mail from her creditors. In addition, she advised Respondent
14 that she had placed a call to a consumer fraud assistance line. Gueye asked Respondent to update
15 her regarding her bankruptcy matter. Respondent did not respond to Gueye's request for a status
16 update.

17 On March 26, 2002, Gueye sent Respondent a letter, via certified mail, asking for
18 information about her bankruptcy matter. However, the letter was returned to Gueye as
19 unclaimed, after the United States Postal Service made two attempts to deliver the letter.

20 On April 15, 2002, Gueye filed a formal complaint against Respondent with the State
21 Bar. In addition, on April 18, 2002, Gueye filed a complaint with her group legal services
22 provider.

23 From April 18, 2002 through August 27, 2002, the legal services provider attempted to
24 resolve the communication problems between Gueye and Respondent.

25 On October 28, 2002, Gueye sent Respondent a letter and an e-mail terminating his
26 services and requesting a refund of the fees paid. Respondent failed to return any monies to
27 Gueye.

28 On October 29, 2002, Respondent sent Gueye an e-mail indicating he had sent her file to

1 the bankruptcy court.³

2 **Legal Conclusions**

3 **Count Four - Rule 3-700(A)(2) (Improper Withdrawal from Representation)**

4 By undertaking representation of Gueye in the bankruptcy matter, and then failing to take
5 action in the matter and ceasing all communication with the client, but without informing her that
6 he was ceasing to represent her, Respondent effectively withdrew from representation with taking
7 reasonable steps to avoid foreseeable prejudice to her.

8 **Count Five - Rule 3-700(D)(2) (Failure to Return Unearned Fees)**

9 Rule 3-700(D)(2) requires an attorney whose employment has terminated to promptly
10 return any part of a fee paid in advance that has not been earned. This rule does not apply to true
11 retainer fees paid solely for the purpose of ensuring the availability of an attorney to handle a
12 matter.

13 Since it is not clear when Respondent ceased performing in Gueye's bankruptcy matter
14 and what services, if any, he had performed before he abandoned the matter, it is not clear that
15 Respondent was required to refund the sum of \$800 or some portion thereof. However,
16 Respondent should have accounted to the client for the monies paid as advanced fees, showing
17 that either the \$800 had been earned, or that some refund to the client was warranted. Therefore,
18 the court finds there is a lack of clear and convincing evidence that Respondent failed to return
19 an unearned fee in violation of rule 3-700(D)(2). The court will use Respondent's failure to
20 account to the client regarding the \$800 in aggravation.

21 **Count Six - Section 6068(m) (Failure to Communicate)**

22 By failing to respond to Gueye's telephone calls, e-mails and letters, all seeking an update
23 regarding her case, Respondent failed to respond promptly to reasonable status inquiries of a
24 client in a matter in which he agreed to provide legal services, in wilful violation of section
25 6068(m).

26 _____
27 ³There is no evidence that Respondent filed a bankruptcy petition on behalf of Gueye.
28 Therefore, it is not clear what Respondent was referring to in his reply that her file had been sent
to the bankruptcy court.

1 **Case No. 02-O-11919 - The Strand Matter - Count Seven through Nine**

2 **Facts**

3 On October 28, 1999, Brenda Strand (Strand) employed Respondent to represent her in a
4 marital dissolution matter. Strand had obtained Respondent's name from her employer as part of
5 its group legal services plan.

6 On October 28, 1999, Respondent filed the petition for dissolution of Strand's marriage.
7 Strand and her ex-husband had no outstanding issues to be settled. Strand provided Respondent
8 with all necessary documents by September 23, 2001.

9 In September 2001, Respondent gave to Strand the finalized marital settlement agreement
10 for the signature of Strand and her soon to be ex-husband.

11 In December 2001, Strand delivered to Respondent for filing the fully executed and
12 notarized marital settlement agreement. Respondent promised to promptly file the settlement
13 agreement, and that he would contact Strand after the agreement was filed.

14 However, after December 2001, Respondent performed no additional legal services in the
15 marital dissolution matter. Respondent did not inform Strand that he ceased performing legal
16 services on her behalf.

17 From December 2001 through February 2002, Strand placed telephone calls to
18 Respondent's office, leaving messages asking Respondent to advise her of the status of the
19 dissolution case. Respondent did to respond to the telephone calls.

20 On February 20, 2002, having heard nothing from Respondent, Strand mailed and hand
21 delivered a letter to Respondent, asking the status of the marital dissolution case. Respondent
22 did not respond to Strand's letter asking for a status update.

23 On April 9, 2002, Strand wrote another letter to Respondent asking the status of the
24 marital dissolution. Strand noted that if she did not hear from Respondent about her case, she
25 would filed a complaint with the Alameda County Bar Association.

26 On July 17, 2002, Strand sent yet another letter to Respondent, but this time by certified
27 mail. She requested that Respondent return her client file and all documents relating to the
28 marital dissolution matter. Respondent signed for the certified letter on July 23, 2002. However,

1 Respondent did not respond to the letter or the request.

2 On September 26, 2002, Strand sent Respondent a letter, via certified mail, wherein she
3 terminated Respondent's legal services and requested an accounting and the return of her client
4 file. However, the letter was returned to Strand by the postal service as unclaimed.

5 **Legal Conclusions**

6 **Count Seven - Rule 3-700(A)(2) (Improper Withdrawal from Representation)**

7 Without notice, Respondent ceased performing legal services and communicating with
8 Strand, and thereby withdrew from employment without taking reasonable steps to avoid
9 reasonably foreseeable prejudice to her, in wilful violation of rule 3-700(A)(2).

10 **Count Eight - Rule 3-700(D)(1) (Failure to Return Client Papers or Property)**

11 Rule 3-700(D)(1) requires an attorney whose employment has been terminated to
12 promptly release to the client, at the client's request, all client papers and property, subject to any
13 protective order or non-disclosure agreement. This includes correspondence, pleadings,
14 deposition transcripts, exhibits, physical evidence, expert's reports and other items reasonably
15 necessary to the client's representation, whether the client has paid for them or not.

16 Strand terminated Respondent's services and requested an accounting and the return of
17 her client file. As of the filing of the notice in this matter, Respondent had not returned her client
18 file. By failing to return to Strand, upon her request, her client file, Respondent willfully violated
19 rule 3-700(D)(1).

20 **Count Nine - Section 6068(m) (Failure to Communicate)**

21 By failing to respond to Strand's phone calls and letters, Respondent failed to respond to
22 reasonable status inquiries, in wilful violation of section 6068(m).

23 **Case Nos. 02-O-10549; 02-O-11408; 02-O-11854; 02-O-11919 - All The Matters - Count Ten**

24 **Facts**

25 In 1992, Riedstra, Rodgers and Gueye filed complaints against Respondent with the State
26 Bar in connection with his handling of their respective legal matter.

27 On January 31, 2002, the State Bar opened an investigation regarding allegations of
28 misconduct made by Riedstra (Case No. 02-O-10549).

1 On March 21, 2002, the State Bar opened an investigation regarding allegations of
2 misconduct made by Rodgers (Case No. 02-O-11408).

3 On April 15, 2002, the State Bar opened an investigation regarding allegations of
4 misconduct made by Gueye (Case No. 02-O-11854).

5 On May 31, 2002, and June 25, 2002, a State Bar investigator wrote to Respondent
6 regarding the allegations of misconduct made by Riedstra, Rodgers and Gueye.⁴ The letters
7 asked Respondent to respond, by June 14, 2002, to specified allegations of misconduct being
8 investigated by the State Bar regarding the Riedstra, Rodgers and Gueye matters. The letters
9 were placed in a sealed envelope correctly addressed to his official address. The letters were
10 sent by first-class mail, postage prepaid and were as not returned as undeliverable or for any
11 other reason.

12 Respondent did not reply to either letter sent by the investigator regarding the complaints
13 filed by Riedstra, Rodgers and Gueye.

14 **Legal Conclusions**

15 **Count Ten - Section 6068(i) (Failure to Participate in a Disciplinary Investigation)**

16 Section 6068(i) requires an attorney to participate and cooperate in any disciplinary
17 investigation or other disciplinary or regulatory proceeding pending against him.

18 By not providing a written response to the allegations of misconduct, Respondent did not
19 participate in the investigation of the allegations of misconduct or otherwise cooperate in the
20 State Bar's investigation, in wilful violation of 6068(i).

21 **LEVEL OF DISCIPLINE**

22 **Aggravating Circumstances**

23 Respondent's multiple acts of misconduct are an aggravating factor. (Standard 1.2(b)(ii),
24

25 ⁴The NDC alleges that the Strand matter was also included in the subject letter of the
26 investigator, however, the NDC does not allege that Strand filed a complaint against Respondent
27 and that the State Bar opened an investigation regarding the complaint. Since the allegations of
28 the NDC are deemed admitted as a result of Respondent's default, the absence of the allegations
regarding the filing of a complaint and the opening of an investigation in connection with the
Strand matter, precludes inclusion of the Strand matter in this count.

1 Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct (standards).)

2 Respondent's misconduct significantly harmed the four clients, since he literally
3 abandoned their respective legal matters. (Standard 1.2(b)(iv).) As an example of the harm
4 caused by Respondent's misconduct, Riedstra incurred a \$240 bill for exemptions from 1999
5 through 2001, because of the delay in the title transfer. She would not have incurred this expense
6 if Respondent had performed the services he agreed to perform.

7 Respondent has made no attempt to rectify or atone for the consequences of his
8 misconduct. (Standard 1.2(b)(v).)

9 Respondent's failure to participate in this proceeding prior to the entry of default is also
10 an aggravating factor. (Standard 1.2(b)(vi).) He has demonstrated his contemptuous attitude
11 toward disciplinary proceedings as well as his failure to comprehend the duty of an officer of the
12 court to participate therein, a serious aggravating factor. (Standard 1.2(b)(vi); Cf. *In the Matter*
13 *of Stansbury* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 104, 109.)

14 There is no evidence that Respondent ever provide an accounting regarding the \$800 paid
15 to him by Gueye in connection with the bankruptcy matter.⁵ However, the NDC did charge
16 Respondent with a failure to account. While an attorney cannot be disciplined for a violation not
17 alleged in the NDC, the misconduct may be used in aggravation. (*Rose v. State Bar* (1989) 49
18 Cal.3d 646, 654.) The court is satisfied that facts that could have formed the basis for a charge of
19 failure to account to the client were included in the notice, and therefore, satisfy the notice
20 requirement to find aggravation in this default matter. (*In the Matter of Morone* (Review Dept.
21 1990) 1 Cal. State Bar Ct. Rptr. 207, 217.)

22 **Mitigating Circumstances**

23 Respondent bears the burden of establishing mitigation by clear and convincing evidence,
24 and since he did not participate in these proceedings, no mitigating evidence was presented.

25
26 ⁵The NDC charged respondent with a failure to return unearned fees in connection with
27 the \$800. However, the court did not find that violation because there was no clear and
28 convincing evidence that the \$800, or some portion thereof, should have been returned to the
client.

1 However, pursuant to Evidence Code section 452(d) the court takes judicial notice of the
2 membership records of the State Bar and the fact that Respondent has no prior record of
3 discipline for the purpose of mitigation. (Standard 1.2(e)(i).) However, Respondent had been in
4 practice approximately nine years prior to the start of his misconduct in the Riedstra matter. The
5 court, therefore, affords only slight mitigating weight to the absence of a prior record of
6 discipline. (*In the Matter of Lynch* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 287, 295
7 [attorney's unblemished practice of law for a little over eight years prior to the start of her
8 misconduct was a mitigating circumstance, but did not deserve significant weight].)

9 **Discussion**

10 The purpose of disciplinary proceedings is not to punish the attorney, but to protect the
11 public, to preserve public confidence in the profession, and to maintain the highest possible
12 professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Cooper*
13 *v. State Bar* (1987) 43 Cal.3d 1016, 1025; standard 1.3.)

14 Standard 1.6 provides that the appropriate sanction for the misconduct found must be
15 balanced with any mitigating or aggravating circumstances, with due regard for the purposes of
16 imposing discipline. If two or more acts of professional misconduct are found in a single
17 disciplinary proceeding, the sanction imposed shall be the most severe of the applicable
18 sanctions. (Standard 1.6(a).) The level of discipline is progressive. (Standard 1.7(b).) The
19 standards, however, are guidelines from which the court may deviate in fashioning the most
20 appropriate discipline considering all the proven facts and circumstances of a given matter. (*In*
21 *re Young* (1989) 49 Cal.3d 257, 267 (fn. 11); *Howard v. State Bar* (1990) 51 Cal.3d 215.) They
22 are "not mandatory 'sentences' imposed in a blind or mechanical manner." (*Gary v. State Bar*
23 (1988) 44 Cal.3d 820, 828.)

24 Standards 2.4(b), 2.6(a) and 2.10 apply in this matter. The more severe sanction is
25 suggested by standard 2.6(a), which provides for suspension or disbarment.

26 Respondent has been found culpable in four client matters of various violations of the
27 rules and statutes governing attorney conduct, specifically failing to complete legal services and
28 to communicate with his clients, improper withdrawal from employment, failing to return client

1 files and failing to cooperate in the State Bar's investigation. There is slight mitigation for the
2 lack of a prior record for approximately nine years. In aggravation, the court has found multiple
3 acts of misconduct, significant client harm, indifference toward rectification or atonement, failure
4 to participate prior to the entry of default, and failure to account for monies paid in the Gueye
5 matter. The State Bar recommends, among other things, a 60 to 90 day actual suspension.

6 In *In the Matter of Greenwood* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 831,
7 discipline consisting of 18 months stayed suspension, two years probation and 90 days actual
8 suspension was imposed for mishandling two client matters. The attorney was found to have
9 failed to perform legal services; failed to communicate with the clients; failed to return client
10 files; to have improperly withdrawn from representation; to have violated a court order and not
11 maintained respect for courts by not complying with a discovery order, and to have failed to
12 cooperate with the disciplinary investigation. No mitigating circumstances were found as the
13 attorney defaulted in the proceedings. Client harm was found as an aggravating factor.

14 The court found instructive *In the Matter of Sullivan* (Review Dept. 1997) 3 Cal. State
15 Bar Ct. Rptr. 608, and *In the Matter of Johnston* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr.
16 585.⁶

17 *Sullivan*, like respondent, was found culpable of misconduct arising out of his oversight
18 of four client matters, wherein he failed to perform legal services and to communicate with the
19 clients. However, it was found that a former secretary in *Sullivan's* office hid in her desks
20 pertinent documents that resulted in the misconduct in the four clients matters. In addition,
21 *Sullivan* demonstrated significant mitigating factors, including many years of discipline-free
22 practice. *Sullivan* was actually suspended for 60 days.

23
24 ⁶In its brief, the State Bar also cited two additional cases which the court considered in
25 determining the range of discipline in this matter: (1) *In the Matter of Aguiluz* (Review Dept.
26 1992) 2 Cal. State Bar Ct. Rptr. 32, a single client matter, where a stayed suspension was
27 imposed because the attorney failed to perform legal services, failed to communicate with the
28 client, and improperly withdrew from employment; (2) *Colangelo v. State Bar* (1991) 53 Cal.3d
1255, a single client matter, where the Supreme Court imposed an eighteen month stayed
suspension because the attorney failed to communicate, failed to perform with competence,
improperly withdrew from employment, and failed refund unearned fees.

1 *Johnston* was found culpable of misconduct in a single client matter where he agreed to
2 represent the client in a personal injury case. After filing a complaint on behalf of the client,
3 *Johnston* failed to prosecute the matter. The client subsequently requested her client file and met
4 with *Johnston* at his home. At that meeting, *Johnston* failed to tell the client that he was
5 suspended from the practice for failing to pay his bar dues, but instead, told the client he was
6 waiting for a trial date. He only provided the client with a portion of her client file. *Johnston*
7 had no prior record of discipline, a mitigating factor, but that factor had to be balanced against
8 several aggravating factors, including his failure to participate in the State Bar's investigation,
9 and the fact that he held himself out as entitled to practice law when he was not entitled to do so.
10 *Johnston* was suspended for 60 days.

11 Thus, the court finds the range of discipline to be from a stayed suspension to a 90-day
12 period of actual suspension. The court finds the misconduct *Greenwood*, which resulted in a 90-
13 day actual suspension, to be more serious in that it involved not only the abandonment of two
14 client matters, but also the violation of a court order and failure to maintain respect for the court
15 by not complying with a discovery order. Both *Sullivan* and *Johnston* received actual
16 suspensions of 60 days. However, unlike *Sullivan*, respondent's inattention and neglect of the
17 four client matters arises from his own conduct, and not that of anyone in his office. While
18 *Johnston's* misconduct arose from a single client matter, it involved serious aggravating factors,
19 including but not limited to, holding himself out as entitled to practice law while suspended.
20 However, *Johnston* demonstrated more mitigation in that he had a period of blemish free
21 practice.

22 In connection with the four client matter, Respondent performed some services, but
23 clearly abandoned the causes of his clients, failing to complete the matters and ceasing to
24 communicate with the clients or to respond to their requests for status information and for their
25 client files. There is no evidence that Respondent has made any attempt to rectify the problems
26 created by his inattention to these client matters. In addition, Respondent's misconduct and lack
27 of participation in this matter raises concerns about his ability or willingness to comply with his
28 ethical responsibilities to the public and to the State Bar. No explanation has been offered that

1 might persuade the court otherwise and the court can glean none.

2 After considering the misconduct and the law, and balancing the aggravating and
3 mitigating factors, the court recommends, among other things, actual suspension of 60 days and
4 until Respondent makes restitution and complies with rule 205.

5 **DISCIPLINE RECOMMENDATION**

6 Accordingly, it is hereby recommended that respondent DONALD L. BIERMAN be
7 suspended from the practice of law for two years, that said suspension be stayed, and that he be
8 actually suspended from the practice of law for 60 days and until he provides satisfactory proof
9 to the State Bar's Office of Probation of either a judicial determination that he owes no money to
10 Ndap Gueye in connection the bankruptcy matter, or payment of restitution to Ndap Gueye (or
11 the Client Security Fund, if appropriate) in the amount of \$800 plus 10% interest per annum from
12 October 20, 2001, and until the State Bar Court grants a motion to terminate respondent's actual
13 suspension at its conclusion or upon such later date ordered by the court. (Rules Proc. of State
14 Bar, rule 205(a), (c).)

15 It is also recommended that Respondent be ordered to comply with the conditions of
16 probation, if any, hereinafter imposed by the State Bar Court as a condition for terminating his
17 actual suspension.

18 If the period of actual suspension reaches or exceeds two years, it is further recommended
19 that Respondent remain actually suspended until he has shown proof satisfactory to the State Bar
20 Court of rehabilitation, fitness to practice, and learning and ability in the general law pursuant to
21 Standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct. (Rules Proc.
22 of State Bar, rule 205(b).)

23 If the period of actual suspension reaches or exceeds 90 days, it is further recommended
24 that Respondent be ordered to comply with the requirements of rule 955 of the California Rules
25 of Court within 120 calendar days of the effective date of the Supreme Court order in this matter,
26 and file the affidavit provided for in paragraph (c) within 130 days of the effective date of the
27 order showing his compliance with said order. Failure to comply with rule 955 could result in
28 disbarment. (*Bercovich v. State Bar* (1990) 50 Cal.3d 116, 131.) Respondent is required to file a

1 rule 955(c) affidavit even if he has no clients to notify. (*Powers v. State Bar* (1988) 44 Cal.3d
2 337, 341.)

3 It is further recommended that Respondent be ordered to take and pass the Multistate
4 Professional Responsibility Examination given by the National Conference of Bar Examiners
5 within one year from the effective date of the Supreme Court's order or during the period of his
6 actual suspension, whichever is longer, and furnish satisfactory proof of such to the Probation
7 Unit of the Office of the Chief Trial Counsel within said period.

8 **COSTS**

9 The court recommends that costs be awarded to the State Bar pursuant to Business and
10 Professions Code section 6086.10, and that those costs be payable in accordance with section
11 6140.7.

12
13
14 Dated: November 24, 2003



JOANN M. REMKE
Judge of the State Bar Court

CERTIFICATE OF SERVICE
[Rule 62(b), Rules Proc.; Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of San Francisco, on November 24, 2003, I deposited a true copy of the following document(s):

DECISION

in a sealed envelope for collection and mailing on that date as follows:

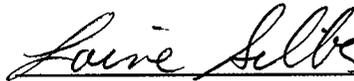
- [X] by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at San Francisco, California, addressed as follows:

DONALD L. BIERMAN JR
39210 STATE ST #205
FREMONT CA 94538

- [X] by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

MARIA OROPEZA, Enforcement, San Francisco

I hereby certify that the foregoing is true and correct. Executed in San Francisco, California, on **November 24, 2003**.



Laine Silber
Case Administrator
State Bar Court